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No. 03-121

IN THE

Supreme Court of the United States

CM TAX EQUALIZATION FOUNDATION, INC., *et al.*,

Petitioners,

v.

COLUMBUS-MUSCOGEE COUNTY CONSOLIDATED GOVERNMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

REPLY BRIEF

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16 pp

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

I. Petitioners' Equal Protection Challenge to the LCA Process is Properly Before the Court. 1

II. The Tax Freeze LCA Arbitrarily and Capriciously Denies Muscogee County Residents Rights Available to Other Georgians. 2

III. Petitioners' Privileges and Immunities Claim is Properly Before the Court 3

IV. Petitioners' Right to Travel Claim is Ripe 4

V. The Right to Travel Prohibits More Than Durational Residency Requirements 7

VI. *Allegheny*, not *Nordlinger*, Applies Here. 8

Supplemental Appendix A 1sa

TABLE OF AUTHORITIES

CASES

Attorney General v. *Soto-Lopez*, 476 U.S. 898 (1986) 8

Bailey v. *Wilkes*, 291 S.E.2d 418 (Ga. App. 1982) 5

Griffeth v. *Principal Mutual Life Insurance Co.*, 533 S.E.2d 126 (Ga. App. 2000) 5

Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974) 7

Nordlinger v. *Hahn*, 505 U.S. 1 (1992) 4

North Fulton Community Hospital, Inc. v. *State Health & Planning Development Agency*, 310 S.E.2d 764 (Ga. App. 1983) 6

Romer v. *Evans*, 517 U.S. 620 (1996) 2

Saenz v. *Rose*, 526 U.S. 489 (1999) 3

Sparks v. *Caldwell*, 261 S.E.2d 590 (Ga. 1979) 6

Yee v. *Escondido*, 503 U.S. 519 (1992) 1, 4

Zobel v. *Williams*, 457 U.S. 55 (1982) 3-4, 7

STATUTES

O.C.G.A. § 48-5-311 5

O.C.G.A. § 50-13-1 6

Respondents' Brief in Opposition to the petition for certiorari fails to confront the gravity of the constitutional issues presented by the tax freeze. Instead of first confronting Petitioners' claim that the additional hurdles required for repealing the tax freeze violate the Fourteenth Amendment and Petitioners' claim that the tax freeze unconstitutionally denies Muscogee County residents rights available to every other Georgia citizen, Respondents ask the Court to believe that this case is nothing more than *Nordlinger* redux. But, as discussed in the Petition and below, this case presents the Court with questions that go well beyond the Court's decision in *Nordlinger* upholding California's Proposition 13.

I. Petitioners' Equal Protection Challenge to the LCA Process is Properly Before the Court.

Petitioners have always claimed that the continued operation of the tax freeze LCA violates the Equal Protection Clause. Petitioners' argument that the Equal Protection violation arises from the imposition of more stringent standards for repealing the LCA accordingly is properly before the Court. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992).

Furthermore, Respondents miss the mark with their claim that the current standards for repealing the LCA should be compared to the standards that existed when the LCA was originally enacted in 1982. In 1983

a new Georgia Constitution took effect. That Constitution automatically nullified the LCA effective July 1, 1987. The 1983 Constitution, however, allowed the Georgia General Assembly to continue the Muscogee LCA in force by passing a local act of the legislature (with or without a referendum). Thus, by passing such a local act in 1986, the Georgia General Assembly effectively re-enacted the LCA. But it did so without a local referendum. Repealing the freeze, on the other hand, imposes an additional hurdle by requiring a referendum. That the tax freeze affects an ever-shifting minority of Muscogee County citizens further compounds the difficulties faced by Muscogee County citizens who wish to see the freeze repealed. No legitimate state interest justifies shielding the LCA – which Respondents admit is an anachronism – from the democratic process.

II. The Tax Freeze LCA Arbitrarily and Capriciously Denies Muscogee County Residents Rights Available to Other Georgians.

Respondents do not dispute that, but for its status as an LCA, the tax freeze would violate the Georgia Constitution. By singling out Muscogee County residents for a lower level of constitutional protection, the tax freeze LCA violates the Equal Protection Clause. *See Romer* v. *Evans*, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

Moreover, Respondents offer no real response to this challenge. Their assertion that the freeze affects only county, not state, revenues misses the point. In any other Georgia county, Georgia's Constitution would protect taxpayers from being taxed different amounts on nearly identical houses. That state taxes are assessed as required by Georgia's Constitution has no bearing on this case.

Finally, none of the other LCAs cited by Respondents deny county residents the right, provided for in the Georgia Constitution, to have comparably valued property taxed at the same rate. The exemption of Muscogee County from this otherwise applicable constitutional protection is, as discussed in the Petition, a violation of the Equal Protection Clause of the United States Constitution.

III. Petitioners' Privileges and Immunities Claim is Properly Before the Court.

Respondents would have the Court ignore Petitioners' argument that the Muscogee County LCA denies newcomers rights protected by the Privileges and Immunities Clause, supposedly because Petitioners did not cite specifically the Privileges and Immunities Clause in their complaint or in their arguments to the courts below. But Petitioners did claim that the tax freeze violates the right to travel, a claim that necessarily implicates the Privileges and Immunities Clause. *See Saenz* v. *Rose*, 526 U.S. 489, 502-03 (1999) (discussing close relationship between right to travel and Privileges and Immunities Clause); *Zobel* v. *Williams*, 457 U.S. 55, 78-79 (1982) (O'Connor, J.,

concurring) ("Article IV's Privileges and Immunities Clause has enjoyed a long association with the rights to travel and migrate interstate.").

Even if Petitioners' complaint did not mention the Privileges and Immunities Clause by name, Petitioners' arguments before the courts below relied on the interpretation of the Privileges and Immunities Clause articulated by Justice O'Connor in *Zobel*. *See Yee*, 503 U.S. at 534.

IV. Petitioners' Right to Travel Claim is Ripe.

In *Nordlinger* v. *Hahn*, 505 U.S. 1 (1992), this Court pointedly did not address whether California's Proposition 13 impermissibly infringes on the right to travel. *Id.* at 10-11. The Court refused to do so because, prior to purchasing her home, Stephanie Nordlinger had lived in California. *Id.*

Petitioners' challenge to the Muscogee LCA gives the Court the opportunity to address the question left unanswered by *Nordlinger*. Petitioners Ron and Faye Sherrill, who bought a home in Muscogee County after moving from out of state, have standing to raise this claim. The house which they purchased in 1998 is valued for property tax purposes at a higher amount than are many houses of comparable value but which had their valuations frozen before 1998. Thus, the Sherrills pay higher ad valorem taxes on their home than do owners of comparably valued homes in Muscogee County, and they do so as a result of their decision to migrate into Muscogee County from out of state.

Respondents argue that the Sherrills lack standing because they did not appeal their tax assessment to the Muscogee County Board of Equalization. Respondents ignore that O.C.G.A. § 48-5-311, which authorizes appeals to county boards of equalization, allows individuals to appeal their assessments only "as to matters of taxability, uniformity of assessment, and value." *Id.* Petitioners raise no issues that are within the jurisdiction of the Muscogee County Board of Equalization. They do not complain that their properties are being over-valued for ad valorem tax purposes. Nor are they complaining about the accuracy or uniformity with which the tax freeze has been implemented. Rather, Petitioners challenge the constitutionality of the entire system of ad valorem taxation in Muscogee County.

Because the Board of Equalization may hear appeals only regarding issues of taxability, value, uniformity, and denial of homestead exemptions, the Muscogee County Board of Equalization would have had no jurisdiction to consider Petitioners' constitutional challenges, and consequently Petitioners did not need to appeal their assessments to the Board. *See Griffeth* v. *Principal Mut. Life Ins. Co.*, 533 S.E.2d 126, 127 (Ga. App. 2000) (holding that where a party is not challenging an administrative decision, there is no requirement that it exhaust administrative remedies); *cf. Bailey* v. *Wilkes*, 291 S.E.2d 418, 421 (Ga. App. 1982) ("'[W]here the question involved is within the jurisdiction of an administrative agency and the question demands the exercise of administrative discretion requiring the special knowledge and experience of the agency, no action for damages will lie

prior to a decision by the agency.'") (quoting 73 C.J.S. *Public Administrative Bodies and Procedures* § 43 at 358). As the trial court aptly stated, "Georgia law is clear that courts will not require a plaintiff to exhaust a futile administrative remedy."[1] (App. 21a.)

Respondents cite two Georgia cases, *North Fulton Community Hospital, Inc.* v. *State Health & Planning Development Agency*, 310 S.E.2d 764 (Ga. App. 1983), and *Sparks* v. *Caldwell*, 261 S.E.2d 590 (Ga. 1979), for the proposition that Georgia law required Petitioners to appeal their assessments to the Board of Equalization. (Opp. Cert. at 24.) Those cases, however, involved plaintiffs who had appealed administrative decisions under the Administrative Procedure Act, O.C.G.A. § 50-13-1. The courts in *North Fulton* and *Sparks* concluded that because the plaintiffs had not presented their constitutional issues during their arguments before the administrative agencies, they could not raise them when subsequently appealing those agencies' decisions to the superior court. Those cases do not hold that plaintiffs challenging the constitutionality of an entire tax system must frivolously bring claims before an administrative agency that has no authority to address their grievances.

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[1] Counsel for Respondents admitted as much in the trial court, stating that "Georgia law is clear that . . . the courts will not require a plaintiff to exhaust a futile administrative remedy, and I think that's basically what would have happened in this case." (See Petitioners' Supp. App. 3sa.)

V. The Right to Travel Prohibits More Than Durational Residency Requirements.

The Alaska law struck down by this Court in *Zobel* v. *Williams*, 457 U.S. 55 (1982), was not, as Respondents claim, a durational residency requirement. Durational residency requirements condition the receipt of a state-provided benefit on the recipients' having lived in the state for a defined amount of time. *See, e.g., Mem'l Hosp.* v. *Maricopa County*, 415 U.S. 250 (1974). To the contrary, under the law struck down in *Zobel*, every Alaska resident was entitled to receive a dividend from Alaska's Permanent Fund, regardless how long he or she had lived in the state. 457 U.S. at 58-59.

This Court acknowledged that Alaska's statute was not a durational residency requirement: "The Alaska dividend distribution law is quite unlike the durational residency requirements we examined in [*Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969)]." 457 U.S. at 58. Yet the law violated newcomers' right to travel because it "create[d] fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, based on how long they have been in the State." *Id.* at 59.

The right to travel does more than invalidate durational residency requirements; it also prohibits "fixed date, and fixed point residence requirements, which treat established residents differently based on

the time they migrated into the State." *Attorney General* v. *Soto-Lopez*, 476 U.S. 898, 903 n.3 (1986). Like the Alaska statute struck down in *Zobel*, Muscogee County's tax freeze creates an ever increasing number of perpetual classes based only on the length of homeownership in the County. The tax freeze undeniably "uses [a] classification which serves to penalize the exercise of [the right to travel]," *id.* 476 at 903, and as such it is unconstitutional.[2]

VI. *Allegheny*, not *Nordlinger*, Applies Here.

Respondents fail to acknowledge the important differences between this case and *Nordlinger*. Whereas *Nordlinger* dealt with a state-wide decision to implement, through a constitutional amendment, an acquisition value system, this case deals with one county's exemption from an otherwise applicable tax regime that requires taxation based on current-market-value. As such, this case is much closer to the situation presented in *Allegheny* where one county decided to adopt an acquisition value system that was contrary to West Virginia's requirement that property taxes be based on current-market-value.

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[2] Like the statute in *Zobel*, the civil service preference at issue in *Soto-Lopez* was not a durational residency requirement. It did not matter whether the person applying for the preference had recently become a New York resident; all that mattered was whether the applicant had been a New York resident at the time he entered the armed forces. *Id.* at 900 n.1 (quoting the relevant New York constitutional provision). In other words, someone who recently had moved back into New York could qualify for the preference as long as he had been a New York resident at the time he entered the armed forces.

Furthermore, Respondents' attempts to align this case with *Nordlinger* only serve to highlight why the tax freeze is palpably different from California's Proposition 13. The tax freeze does not protect tax payers' reliance interests because it does not prevent the county from raising millage rates – notwithstanding Respondents' homage to the political process. It does not allow for gradual increases in a property's frozen value so that disparities do not grow unchecked forever. Lastly, the freeze has been coupled with an "inflation adjustment," a double dip which causes some tax-payers to pay more than forty times as much in taxes as do owners of comparable properties. (App. 57a.) No legitimate state interest justifies such a grotesquely unfair tax system.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX A – EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS BEFORE HON. GEORGE M. PEAGLER, SUPERIOR COURT OF MUSCOGEE COUNTY, MARCH 14, 2001

IN THE SUPERIOR COURT
OF MUSCOGEE COUNTY
STATE OF GEORGIA

CIVIL ACTION NO.: SU-2000-CV-3256

CM TAX EQUALIZATION, INC. et al.

v.

COLUMBUS-MUSCOGEE COUNTY CONSOLIDATED GOVERNMENT, et al.

MARCH 14, 2002
HON. GEORGE M. PEAGLER, JR., PRESIDING
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[105]THE COURT: But how do you respond to the plaintiff's argument that under O.C.G.A. 48-5-311, you really only appeal to the Board for issues of taxability, uniformity of assessment and value, and that really doesn't go to the constitutionality issue that's being attacked here?

MR. PALMER: I agree with that for a different reason. Because it's administrative appeal, and Georgia law is clear that you're not going to – the courts will not require a plaintiff to exhaust a futilely administrative remedy, and I think that's basically what would have happened in this case. They would have appealed that issue, and whether it's a – whether it's an issue of their appraisal or whether it's a constitutional issue, we know what the answer was going to be.